

83 - 482

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STANLEY H. NATHANSON, Petitioner
v
THE UNITED STATES OF AMERICA, ET AL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stanley H. Nathanson
Petitioner
5217 Beard Ave. S.
Minneapolis, MN 55410
612/922-9049

QUESTIONS PRESENTED

1. Whether the Federal Government should be required to justify on constitutionally neutral grounds by a preponderance of the evidence the discharge of its civil service employees who claim their discharge was in violation of their rights under the First Amendment.
2. Whether the fact that a Federal Government employee has taken a solemn oath in accordance with Title 5 of the United States Code, Section 3331 should be considered by the courts in applying the Mt. Healthy rule and the Pickering balancing test.

TABLE OF CONTENTS

Table of authorities	pg i
Opinions below.....	pg 1
Jurisdiction.....	pg 1
List of the Parties.....	pg 2
Constitutional and Statutory Provisions involved.....	pg 3
Statement of the case.....	pg 3
Reasons for granting the petition.....	pg 4
1. Both the district court and the Eight Circuit Court of Appeals seriously misinterpreted this Court's holdings in <u>Pickering</u> and <u>Mount Healthy</u>	pg 4
2. This Court's opinion in the <u>Connick</u> case, both as to what type of activity by a Federal employee constituted protected speech and where the balance of interests should be struck, is unclear necessitating further review of the issues.....	pg10
3. This case raises the issue of the duties and privileges of the "oath-taking" Federal Civil Servant which was overlooked by the lower courts....	pg11
Conclusion.....	pg13
Appendices.....	pgA1
A. Order of the Eighth Circuit Court of Appeals.....	pgA1
B. Findings of Fact, Conclusions of Law and Order of the District Court, District of Minnesota, Fourth Division.....	pgA12

TABLE OF AUTHORITIES

Cases:

<u>Pickering v Board of Education</u> , 391 US 563...	pg 4,5,
	... pg 10,11
<u>Mount Healthy City Board of Education v.</u> <u>Doyle</u> , 419 US 274.....	pg 4,5,9
<u>Connick v. Myers</u> , 103 S.Ct 1684.....	pg 10

Amendments:

Ist Amendment, U.S. Const.....	pg 3,4,
	... pg 10

Statutes:

5 USC 3331.....	pg 3,12
33 CFR 325.2(d).....	pg 7,8

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

STANLEY H. NATHANSON, Petitioner
v
THE UNITED STATES OF AMERICA, ET AL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stanley H. Nathanson petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 702 F2d 162. The opinion of the district court is not reported.

JURISDICTION

The judgement of the court of appeals was entered on March 23, 1983. On June 9, 1983, Justice Harry A. Blackmun extended the time within which to file a petition for a writ of certiorari to July

21, 1983. The jurisdiction of this Court is invoked under 28 USC, Section 1251.

LIS OF THE PARTIES

The caption of the case does not completely list the respondents. They are: United States of America, Allan Campbell, Individually and in his capacity as Executive Director of the U.S. Civil Service Comm.; Clifford Alexander, Jr., Individually and in his capacity as Secretary of the U.S. Army; Lieutenant General John W. Morris, Individually and in his capacity as Chief Engineer, U.S. Army Corps of Engineers; Major General Richard L. Harris, Individually and in his capacity as North Central Division Engineer, U.S. Army Corps of Engineers; Colonel Forrest T. Gay, III, Individually and in his capacity as St. Paul District Engineer, U.S. Army Corps of Engineers; William Goetz, Individually and in his capacity as Chief, Construction-Operations Division, St. Paul District, U.S. Army Corps of Engineers; and William D. Parsons, Individually and in his capacity as Chief, General Regulatory Branch, Construction-

Operations Division, St. Paul District, U.S. Army
Corps of Engineers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the U.S. Constitution provides in relevant part:

Congress shall make no laws *** abridging the freedom of speech ***

2. Title 5 of the U.S. Code, Section 3331 provides in relevant part:

An Individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I * do solemnly swear(or affirm) that I will support and defend the Constitution of the United States against all enemies foreign and domestic, that I will bear true faith and allegiance to the same: *** and that I will faithfully discharge the duties of the office on which I am about to enter, So help me God"

STATEMENT OF THE CASE

1. Petitioner appeals from an adverse ruling by Eighth Circuit Court of Appeals. The Court held that there was ample evidence for the district court to view Petitioner's discussions with his supervisors as disruptive conduct threatening the efficiency of

performance of his duties and that the district court did not error in finding that Petitioner's speech was not the substantial and motivating factor for his discharge. Specifically, the district court found that Petitioner's expression of his views hindered the efficient operation of the Corps of Engineers, that Petitioner's speech was not protected by the First Amendment, that Petitioner's speech, even if it were constitutionally protected, did not play a substantial role in respondents' decision to fire him, that respondents would have discharged Petitioner from his position as an application review specialist even if he had not expressed his views, that Petitioner's First Amendment rights to free speech were not violated by any of the respondents and that Petitioner was not entitled to damages for lost salary and fringe benefits nor to reinstatement as an application review specialist.

REASONS FOR GRANTING THE PETITION

1. Both the district court and the Eighth Circuit Court of Appeals seriously misinterpreted this Court's holdings in the Pickering and Mount Healthy cases by

ruling in favor of the respondents in this matter.

This Court has made it plain that the government bears the burden of demonstrating by a preponderance of the evidence that Petitioner would have been fired even in the absence of the protected speech. In Mount Healthy City Board of Education v Doyle, 429 U.S 274(1977), this Court added another factor to the Pickering balancing test to determine whether an employee was properly discharged. Reasoning that an employee should not be able to insulate his on-the-job conduct from supervisory review merely by engaging in speech which might lead to his discharge, this Court permitted the government to defend its actions by proving that the employee would have been fired even in the absence of the protected speech:

The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 286

Had this rationale been properly applied here, the government could not have proved its case because it could not have satisfied the test of demonstrating by a preponderance of the evidence that Petitioner would have been fired even if he had not repeatedly expressed his views on the enforcement of various environmental laws of the Corps of Engineers.

In the letter of April 28, 1978, notifying Petitioner of his termination, the following reasons were given for the dismissal:

***shown an inability to accept guidance and direction from supervisory personnel, *** failed to properly follow administrative guidelines and operating procedures, ***and demonstrated poor judgement in coordinating ***activities with other state and federal agencies.(Pl. Exh. 13).

Respondent Parsons admitted that the letter completely and accurately set forth the reasons for the dismissal(Tr 466), but none of the criticisms is reasonably supported by the evidence. The contention that Petitioner refused to accept guidance and direction is belied by Petitioner's own testimony which is corroborated by Mr. Mazurkiewicz -- that Petitioner never refused to obey an explicit instruction or order.(Tr. 112, 308, 531.) Neither

Mr. Parsons nor Mr. Mazurkiewicz was able to describe a specific instance where Petitioner failed or refused refused to follow regulations or instructions(Tr. 308, 308, 472-475). On the other hand, the record contains several affirmative examples of Petitioner's willingness to accept supervisory guidance. Although Mr. Mazurkiewicz testified that the Petitioner had difficulty writing legibly on certain occasions(Tr. 283), he admitted that Petitioner made an effort to improve his handwriting(Tr. 304). In several cases, Petitioner followed orders in the face of his sharp philosophical differences with Respondent Parsons's determination on how to handle a file(Tr. 81).

To the contention of failing to properly follow administrative guidelines and procedures, Mr. Kadlec testified that there was no formal or systematic compilation of office policy within the General Regulatory Branch, except the provisions of the Code of Federal Regulations governing the suggested timetable for processing permits. 33 C.F.R., Section 325.2(d). (Tr. 472-74) However, both Parsons and Mazurkiewicz conceded that these guidelines were rarely followed by any processor(Tr. 172, 461). In

fact, the government presented not one piece of credible evidence that Petitioner failed to perform adequately under the guidelines. Both Parsons and Mazurkiewicz admitted that there were legitimate reasons for failing to adhere to the guidelines set forth in 33 C.F.R., Section 325.2(d). So numerous and varied were the reasons, that Respondent Parsons admitted that Gov. Exh. 35, the chart which attempted to summarize the disposition of Petitioner's files proved nothing since the legitimacy of the delay could only be judged by extraneous factors (Tr. 461).

Finally, the contention of poor judgement in dealing with other government agencies was specifically refuted by the only employee of another agency to testify (Tr. 36, 41), and the government introduced no evidence of how Petitioner dealt with other agencies.

On the other hand, substantial evidence of Respondent Parsons's hostile attitude toward Petitioner's personal views was presented. Petitioner testified that Parsons informed him on April 28, 1978

that he was firing him because he disagreed with Petitioner's views on the operation of the office and therefore felt he could not trust Petitioner to carry out his directives. Respondent Parsons never offered any testimony disputing what Petitioner said and in Pl. Exh. 22(Tr. 468), a memorandum which Parsons wrote to the Personnel Office on April 21, 1978, requesting that Petitioner be fired, he states as the basis for his action that Petitioner wants to do things his way, to reshape the District's regulatory program to conform with his perception of the way things should be.

If both the district court and the Court of Appeals had applied the Mount Healthy rule as this Court surely intended, the government would have had to justify Petitioner's discharge on Constitutionally neutral grounds by a preponderance of the evidence at trial and with at least substantial evidence on review by the Appeals Court. The courts could not reasonably have concluded that the Corps had met that standard. Otherwise, no Federal Civil Service employee on probation could ever successfully challenge his discharge for even the most legitimate

reason because the government could always present some adverse testimony, no matter how minor or unsubstantiated, and have the discharge upheld. In the interests of Justice, this Court must review and clarify the standard.

2. This Court's opinion in the Connick case, both as to what type of activity by a Federal employee constituted protected speech under the 1st Amendment and where the balance of interests should be struck under the Pickering test, is unclear necessitating further review of the issues.

With this Court's line of reasoning, one would naturally conclude that there was very little Connick could have done in the way of criticizing the District Attorney's Office without offending its interest in efficient delivery of Public Services. This Court states in the last paragraph of that opinion that the fact that the balance is "struck for the Government" where Connick chose the Questionnaire as his vehicle for expression should not be understood as a "defeat for the First Amendment" because on another day in another case there could be some form of expression

which would not offend the Government's interests.

On page 1693 of this opinion, in subsection C, this Court states in applying the Pickering balance that although Myers did not violate announced office policy, the fact that Myers unlike Pickering exercised her rights to speech at the office supports Connick's fears that the functioning of his office was "endangered." Yet, this Court does not go on to announce a general principle or standard for judging whether the functioning of a Federal Government Office is "endangered." As such this Court implies that a case-by-case analysis of the facts and circumstances would have to be used on each challenge by a dismissed Federal employee claiming unlawful discharge due to expression of speech. This can only lead to inconsistent interpretations among the circuits and have a tremendous "chilling affect" on the communication of fruitful ideas and the disclosure of waste and mismanagement by diligent and loyal Federal employees.

3. Finally, this case raises the issue of the duties and privileges of the "oath-taking" Federal

Civil Servant. In the course of trial, Respondent Parsons raised this issue while testifying that when he directed Petitioner to proceed with the Application by the M.A.C. over the objections of the FWS, Petitioner refused indicating that it would be a violation of his "oath of office." (Tr. 387-398) Although the statement that Petitioner refused to proceed was disputed by Petitioner's testimony, the district court accepted Respondent's description and concluded that Petitioner's expression of these views was either not protected under the 1st Amendment or hindered the efficient operation of the Corps of Engineers.

In any event, it seems that the courts have overlooked the implications of Title 5, Section 3331 of the U.S. Code, requiring Federal Civil Service employees to take a solemn oath to faithfully execute their duties and support the Constitution. Obviously, the person who takes the oath is assuming a special responsibility, a fiduciary obligation to the Public to carry out the dictates of its laws, or the act of "oath-taking" would be meaningless. Likewise, this person who bears such a solemn responsibility is

certainly entitled to all benefits of the doubt with respect to his or her actions and intentions. Moreover, if the oath-taking is to have any practical merit i.e. to encourage good, honest and efficient government, then the oath-taker must be privileged to comment on the duties he or she has undertaken, especially to supervisors and colleagues who share the governmental mission, without fear of jeopardizing his or her job. Neither the decision of the trial court nor the review of the Appeals Court in this case contains any such consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stanley H. Nathanson
Petitioner

APPENDIX

APPENDIX A

No. 82-1360

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STANLEY HERBERT NATHANSON

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ORDER

(Filed March 23, 1983)

BEFORE: LAY, HENLEY, and ARNOLD, Circuit Judges.

Stanley H. Nathanson appeals from adverse findings and judgement made by the district court, the Honorable Donald D. Alsop presiding, dismissing his complaint relating to his termination of employment with the United States Army Corps of Engineers. In 1977 Nathanson was a probationary employee working as an applications review specialist with the Corps. He alledged that he was unlawfully terminated due to his expression of opinion and speech in violation of the first amendment. Judge Alsop found that his speech was not protected under the first amendment and that even

if it were under the guidelines of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), it was not a substantial and motivating factor relating to his discharge. On appeal Nathanson asserts that the government failed to carry its burden of proof that his conduct was disruptive to the efficiency and work of the Corps, and that the court's findings that he was discharged for reasons other than his speech were clearly erroneous. We must respectfully disagree; we affirm the judgement of the trial court.

Nathanson's position as a applications review specialist required him to review and evaluate applications for permits for construction in the navigable waters of the United States pursuant to section 10 of the Rivers and Harbors Act of 1899, 33 USC 403(1976), and permits for the dredged and fill material in the waters of the United States pursuant to section 404 of the Federal Water Pollution Control Act, 33 USC 1344(1976). His duties included preparing public notices, securing comments, acquiring additional information, and recommending a final decision. He was supervised by Frank Mazurkiewicz, a chief applications

review specialist, and by William Parsons, who was chief of the General Regulatory Branch of the Construction and Operations Division.

Nathanson asserts that his termination was based upon his expressions and views on environmental policy which violated his first amendment rights.¹

The government asserts at trial that Nathanson was discharged because of poor performance of his duties. On April 28, 1978, Nathanson received a letter signed by Parsons stating that his employment as an applications review specialist would be terminated as of the close of business on May 12, 1978. The letter stated:

This action is being taken as a result of your duty performance. I is my judgement that you have failed to demonstrate the necessary qualifications for successful performance in this position. Specifically, you have shown an inability to accept guidance and direction from supervisory personnel, you have failed to properly properly follow administrative guidelines and operating procedures, and you have demonstrated poor judgement in coordinating your activities with other State and Federal agencies.

According to the record Nathanson received regular regular reviews of his performance from his supervisor,

¹On a prior appeal this court affirmed the dismissal of due process claims on a grant of summary judgement in favor of the government. We, however, remanded the case for plenary trial on Nathanson's first amendment claim. Nathanson v. United States, 630 F. 2d 1260, 1265(8th Cir. 1980).

Mazurkiewicz. During these discussions, Mazurkiewicz counseled him about a number of problem areas relative to his performance. These problems included failing to follow branch policy regarding handling telephone inquiries from the public; writing illegibly, engaging in lengthy arguments with other employees; and use of poor grammar. Mazurkiewicz indicated that Nathanson's writing required considerable reworking, that he required more than average supervision, and that his work needed much improvement. Mazurkiewicz further testified that Nathanson's arguments and discussions with Parsons were disruptive to the branch operations.

Nathanson asserts that these reasons were pretextual and that they constitute a post hoc determination camouflaging the true reason. He claims that his regulatory and environmental philosophy differed sharply from that of Parsons.

There were four primary disputes between Nathanson and Parsons which were focused upon at trial. The parties view these disputes with different approaches. Since we feel the district court's findings turn essentially on its review of these disputes, we summarize those findings: (1) Nathanson told Parsons that it would be

illegal to continue to process an application by the City of Superior, Wisconsin for a permit to deposit dredged and fill materials in St. Louis Bay in connection with the construction of a marina on Barkers Island; (2) Nathanson told Parsons he would not process an application by the Metropolitan Airports Commission for the deposit of fill and riprap in Snelling Lake in connection with the construction of storm water holding ponds at the Minneapolis-St. Paul International Airport without a written directive from Parsons requiring a conditioned permit; (3) Nathanson refused to list activities of the Minnehaha Creek Watershed District in connection with a project for the construction of canoe launching ramps and related facilities which were still subject to jurisdiction under section 404 of the Clean Water Act, but rather indicated that there was simply no jurisdiction unless water quality impacts were shown to exist; and (4) Nathanson told Parsons that it was illegal and unethical for employees of the Corps of Engineers to recommend or suggest modification of the Wilkins-Ottertail Joint County Ditch Number Two project for the purpose of preventing the Corps of Engineers

from exercising jurisdiction over the project.

Nathanson's argument is that it was his "ideas" not his behavior that led to his dismissal. The district court found otherwise. The district court concluded: (1) Nathanson's expression of his views concerning the proper method of processing these three applications hindered his ability to carry out his functions as an applications review specialist and the overall operations of the Corps of Engineers; (2) Nathanson's speech did not play a substantial role in the defendants' decision to discharge him; (3) Nathanson would have been discharged even if he had not expressed his opinions concerning the methods of processing the Barkers Island Project, the Metropolitan Airports Commission project, the Minnehaha Creek project, and the Wilkins-Ottertail Joint Ditch Number Two project.

Nathanson now asserts there is not sufficient evidence to support the trial court's conclusions. He asserts the court's findings are clearly erroneous. We disagree. As we have observed many times before, our standard of review does not allow us to substitute our own impressions for those of the district court. E.g., Horner v. Mary Institute, 613 F. 2d 706, 713(8th Cir. 1980); St. Louis Typographical Union No. 8 v. Herald

Co., 402 F. 2d 533, 557(8th Cir. 1968).

We, of course, cannot decide the case de novo. In reviewing the evidence and the court's findings we rely on standards in both Pickering v. Board of Education, 391 U.S. 563, 572-73(1968) and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 284-87 (1977).

Nathanson's views must be examined as "private expressions" as distinguished from public speech. Although the first amendment protects both forms of speech, the Supreme Court in Civhan v. Western Line Consolidated School District, 439 U.S. 410(1979), makes clear we confront a differing standard of review when dealing with private expression. The Court there stated:

Although the First Amendment's protection of government employees extends to private as well as public expression, striking the Pickering balance in each context may involve different considerations. When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they "in any way either impeded the teacher's proper performance of his daily duties in the classroom or...interfered with the regular operation of the schools generally." Id., at 572-573. Private expression, however, may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered. Id. at 415 n.4.

Following Nivhan, the court in Key v. Rutherford, 645 F. 2d 880, 884-85(10th Cir. 1981), remanded an act action wherein a former police chief claimed the city violated his first amendment rights when his employment was terminated after he complained to the mayor about departmental grievances and limitations on his right to join a police officers' fraternal organization. The court emphasized that plaintiff's comments were directed to the mayor personally rather than to the public. The court found that this was not significant "because the Pickering test takes into account not only the content of the speech (whether it involves matters of public interest as opposed to purely personal concerns), but also the manner of expression (whether it is conveyed privately or to the public at large)." Id. at 884. Further, in Mt. Healthy the Court observed:

The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86.

We find there was ample evidence for the district court to view Nathanson's argumentative discussions with his superiors as disruptive conduct threatening the efficiency of performance of his duties. On at least three occasions processing of the applications for permits had to be referred to others within the office because of Nathanson's refusal to continue processing the applications. Whether Nathanson's views were right or wrong, Parsons responded to them as behavior that was deemed bordering on insubordination. We emphasize it was not the expression of his views that the district court found led to his dismissal. Parsons did not fire Nathanson because he was an environmentalist and disagreed with the policy of the office. True, the evidence allows Nathanson to argue as much; however, the district court is the finder of fact. The district court found that because Nathanson possessed such strong views he could not efficiently carry out his duties in processing the permits. The classic illustration to support this relates to the incident surrounding the application by the Metropolitan Airports Commission to perform work involving storm water treatment.

In connection with that application the United States Fish and Wildlife Service objected to issuance of the permit because the activity would require action by the Commission to satisfy Section 6(f) of the Land and Water Conservation Fund Act. Parsons told Nathanson that the permit could be issued by the Corps upon the condition that it would only be effective when the Commission had complied with section 6(f). Parsons' directive was consistent with 33 CFR 325.5(1982) which specifically provides that "Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest." On two occasions Parsons directed Nathanson to proceed with the application and advise the Fish and Wildlife Service that the Corps intended to issue the permit with such a condition. Nathanson refused by indicating that it would be a violation of his oath of office. Nathanson demanded that Parsons put his directive in writing. Parsons refused and reassigned the file.

We agree that the institutional efficiency of the Corps was not threatened by the content of Nathanson's views. He had every right to express these views to his superiors. However, the manner, time, and place in which

which he expressed these views clearly inhibited his performance in processing permits directed by his superiors. Based upon this record we find the district court did not error in finding that his speech was not the substantial and motivating factor for his discharge. The district court's finding that Nathanson's views hindered his ability to carry out his functions as an applications review specialist and the overall operations of the Corps of Engineers are supported by the evidence and are not clearly erroneous.

Judgement affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

STANLEY HERBERT NATHANSON,

4-78 Civ. 399

Plaintiff,

v.

UNITED STATES OF AMERICA,
et al.,

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER

Defendants.

Dayton, Herman, Graham & Getts, by PHILIP W. GETTS, Esq., Minneapolis, Minnesota, appeared for plaintiff.

JOHN M. LEE, Assistant United States Attorney, Minneapolis, Minnesota, appeared for defendants.

In this action plaintiff, a former employee of the United States Army Corps of Engineers in St. Paul, Minnesota, seeks money damages and reinstatement based upon his alleged illegal discharge by the defendants. Plaintiff claimed: (1) that he was entitled to a pretermination hearing and thus his discharge violated his right to due process; and (2) that his termination was in violation of his rights under the First Amendment.

This court entered summary judgment dismissing the action, the record therefor consisting of the plaintiff's responses to various government interrogatories. Following appeal, the United States Court of Appeals for the Eighth Circuit affirmed the granting of summary judgment on the issue of the alleged violation of due process. The granting of summary judgment with respect to plaintiff's First Amendment claim was reversed, and the action remanded to this court for trial on that issue.

Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980).

The action came on for trial before the court on October 7-8 and November 9-10, 1981. Based upon the evidence there adduced, the court, being fully advised, makes the following:

FINDINGS OF FACT

1. Plaintiff Stanley H. Nathanson is a citizen of the United States and resides in St. Louis Park, Minnesota.

2. Defendant Colonel Forrest T. Gay, III, during all times material to this action, served as the District Engineer, St. Paul District, North Central Division, United States Army Corps of Engineers.

3. Defendant William Goetz, during all times material to this action, served as Chief, Construction and Operations Division, St. Paul District, North Central Division, United States Army Corps of Engineers.

4. Defendant William D. Parsons, during all times material to this action, served as Chief, General Regulatory Branch, Construction and Operations Division, St. Paul District, North Central Division, United States Army Corps of Engineers.

5. On October 11, 1977, plaintiff Nathanson was hired by the St. Paul District, U.S. Army Corps of Engineers, as an applications review specialist in the General Regulatory Branch of the Construction and Operations Division. Nathanson's grade was GS-8, Step 1, and he was paid a salary of \$13,662 per annum.

6. Section 10 of the Clean Water Act, 33 U.S.C. § 1344, and § 404 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, vest in the Corps of Engineers the responsibility for regulating certain activities in waters of the United States.

7. The Corps of Engineers has promulgated regulations implementing its authority under those statutes and setting forth the policies and procedures for its regulatory program. Those regulations are set out at 33 C.F.R. §§ 320-329.

8. An applications review specialist is primarily responsible for reviewing and evaluating applications for permits for construction in the navigable waters of the United States under

Section 10 of the Rivers and Harbors Act of 1899 and permits for the deposit of dredged or fill materials in the waters of the United States pursuant to Section 404 of the Clean Water Act of 1976.

9. During the time of plaintiff's employment, there were between ten and fifteen permit processors employed in the branch.

10. Nathanson's responsibilities included preparing public notices of applications, securing comments from all interested state and federal agencies, acquiring additional information from the applicant if necessary and recommending a final decision on the permit application to the branch chief and to the district engineer.

11. The General Regulatory Branch was supervised by its Chief, defendant William D. Parsons, and was divided into two sections, each headed by a Chief Applications Review Specialist.

12. Nathanson was assigned to a section directed by Frank Mazurkiewicz.

13. In addition to the two section chiefs, each section had one or more senior application review specialists who functioned as information supervisors for specified applications review specialists. Nathanson was supervised by Michael M. Weburg.

14. Administrative guidelines and operating procedures governing the processing of permit applications consist of the regulations, guidance letters received from the Corps headquarters in Washington, guidance letters received from the Corps office in Chicago, written opinions of counsel, and inter branch memoranda. Copies of such documents were provided to all permit processors. Guidance was also provided to processors verbally by their supervisors.

15. Defendant Parsons as branch chief monitored the performance of all permit processors. He met with each processor

two or three times a month to review their files with them. He received a monthly computer printout which indicated which files were not being processed on a timely basis, and that printout was used by him in his discussions with the processors.

16. Federal personnel regulations provide that the first year of employment is a probationary period. The first required formal performance review for probationary employees is to be given when the employee has been at work for nine months.

17. One of the first files assigned to Nathanson was an application on behalf of Wilkin and Otter Tail Counties for the construction of Wilkin-Otter Tail Joint County Ditch Number Two. During the course of processing this application, Nathanson discussed with Mr. Mazurkiewicz and defendant Parsons the question of whether the application should be included in part of the so-called "Nationwide Permitting System," whether a full-scale application should be required, or whether the applicant should be advised to modify the project to exclude those wetlands that were under the jurisdiction of the Corps of Engineers.

18. Nathanson and Parsons had two or three discussions of this matter in January of 1978, during which time Nathanson expressed his strong view that it was illegal and unethical for employees of the Corps of Engineers to recommend or suggest modification of the project for the purpose of preventing the Corps of Engineers from exercising jurisdiction over the project.

19. In addition, the two of them had discussions which plaintiff described in his testimony as "philosophical arguments" regarding whether it would be technically possible to excavate the drainage ditch without depositing the material in the wetlands. Plaintiff took the position that it would not be possible to perform the excavation without depositing material into the wetlands while Parsons took the position that it would be possible to accomplish the work in that manner.

20. Subsequent to those discussions, the permit applicant modified the project in order to satisfy the requirements of the Minnesota Department of Natural Resources. The modification changed the project so that work would be performed in areas outside of Corps jurisdiction. Thus, no further Corps authorization would be needed for the revised project.

21. Plaintiff was directed to set up a field trip to the project site so that the wetland areas subject to Corps jurisdiction could be delineated and avoided in the construction work. Plaintiff organized the trip and participated in the visit to the project area in early May, 1978.

22. Mazurkiewicz, plaintiff's immediate supervisor, discussed plaintiff's work performance with him approximately every two weeks. During these discussions, Mazurkiewicz counseled the plaintiff about a number of problem areas relative to plaintiff's performance. These problem areas included:

- a. Failing to prioritize work;
- b. Failing to follow branch policy regarding handling of telephone inquiries from the public in that plaintiff refused to take calls if he was working on something else;
- c. Engaging in lengthy arguments which were distracting to other employees;
- d. Writing illegibly.

23. Despite these counseling sessions with Mr. Mazurkiewicz, plaintiff's performance did not improve significantly.

24. On several occasions, defendant Parsons discussed the plaintiff's files with him personally.

25. On at least three occasions, defendant Parsons gave plaintiff explicit instructions regarding actions to be taken on particular files and plaintiff was not willing to follow these instructions.

26. Plaintiff was assigned an application by the City of Superior, Wisconsin for a permit to deposit dredged and fill materials in St. Louis Bay in connection with the construction of a marina on Barker's Island.

27. Certain residents of Superior opposed the project on the grounds that the City did not own fee title to the land upon which the project was to be constructed and therefore could not apply for a Corps of Engineers permit.

28. Parsons told the plaintiff that the Corps permit would convey no property rights and that it was standard procedure to continue processing application when that type of objection was received.

29. Plaintiff told Parsons that it would be illegal to continue processing the permit, and he would violate his oath by continuing.

30. After discussing the matter with plaintiff on two separate occasions, Parsons became convinced that the plaintiff would not continue processing the file, so Parsons directed that the file be reassigned.

31. Plaintiff was also assigned an application by the Metropolitan Airports Commission ("MAC") for the deposit of fill and riprap in Snelling Lake in connection with the construction of storm water holding ponds at the Minneapolis-St. Paul International Airport.

32. On March 21, 1978, the United States Fish and Wildlife Service ("FWS") sent a letter to Colonel Forrest T. Gay, the District Engineer, setting forth its objection to the permit application on the ground that the Metropolitan Airports Commission had failed to comply with Section 6(f) of the Land and Water Conservation Fund Act. The letter was received by the Corps of Engineers and routed to plaintiff for inclusion in the file.

33. Plaintiff brought this objection to the attention of defendant Parsons and suggested that processing of the application should be halted until the MAC had complied with Section 6(f) of the Land and Water Conservation Fund Act.

34. Parsons told the plaintiff to continue processing the file and to resolve the Fish and Wildlife Service objection by conditioning the permit so that it would not be effective until the applicant had complied with section 6(f). Parsons told the plaintiff that this was a normal procedure and was consistent with the advice of counsel.

35. Plaintiff, in two or three conversations which took place between March 21, 1978 and April 3, 1978, advised Parsons that conditioning permits as suggested was illegal. Furthermore Nathanson told Parsons that he would not process the file without a directive in writing from Parsons allowing a conditioned permit.

36. In the last of these conversations on April 3, 1978, defendant Parsons told plaintiff that the permit would be issued by conditioning the permit on compliance by MAC and instructed plaintiff to inform the FWS of this decision.

37. On April 3, 1978, plaintiff called Mr. Kenneth Carr, an employee of FWS in St. Paul, and informed Mr. Carr that the application would be issued over the objection of the FWS because "we did not consider such failure to comply as a matter of environmental concern." Plaintiff expressed to Mr. Carr his personal opinion that he disagreed with defendant Parsons' decision because he felt that it was the Corps of Engineers' affirmative obligation to see that the laws of the United States are carried out.

38. Defendant Parsons learned of this telephone conversation and of plaintiff's statement to Carr by reading a telephone log of the conversation which Nathanson completed after he had spoken with Carr.

39. Defendant Parsons also received a telephone call from the Field Solicitor's Office of the U.S. Department of the Interior inquiring about the decision.

40. At the direction of defendant Parsons, the MAC application file was transferred to another applications review specialist shortly after April 3, 1978.

41. A permit was finally issued to the MAC with a condition that the MAC comply with Section 6(f).

42. A third file assigned to plaintiff involved an application by the Minnehaha Creek Watershed District for the deposit of fill in a portion of Gray's Bay in Lake Minnetonka in connection with the construction of canoe launching ramps and related facilities. The project also involved work in and adjacent to Minnehaha Creek, which flows out of Lake Minnetonka west to the Mississippi River. The project involved Corps jurisdiction under both § 404 of the Clean Water Act and § 10 of the Rivers and Harbors Act of 1899.

43. In addition to applying for permits, the Watershed District also filed suit in Federal District Court challenging Corps jurisdiction.

44. On April 18, 1978, the Federal District Court ruled that the Corps has no jurisdiction under § 10 on Lake Minnetonka and also that certain activities were not subject to § 404 jurisdiction.

45. Upon reading the District Court order, Nathanson stopped all work on the application because of the injunctions.

46. Parsons advised plaintiff that it appeared some of the Watershed District's activities in connection with the project were still subject to § 404 jurisdiction and asked plaintiff to list all § 404 activities involving the project.

47. Plaintiff's reply did not list those activities but rather indicated that there was simply no jurisdiction unless water quality impacts were shown to exist.

48. Parsons had further conversations with plaintiff in which he indicated that counsel had interpreted the order, and that there appeared to be some activities in connection with the project which need Corps permits. Therefore, he instructed plaintiff that processing should continue for those activities.

49. Plaintiff told Parsons that doing so would violate the court order, so Parsons reassigned the file to another processor.

50. Defendant Parsons began to consider his decision to discharge plaintiff in early April, 1978.

51. Parsons made the decision to terminate plaintiff's employment. Prior to terminating plaintiff, Parsons discussed the matter with Goetz and told him that on at least three occasions the plaintiff had refused explicit instructions regarding keeping files moving. Defendant Parsons also discussed the matter with Mr. Harris, Chief of the Personnel Office, and with defendant Gay.

52. In addition, Parsons discussed the termination with Mazurkiewicz several times. During these discussions, Mazurkiewicz advised Parsons that the plaintiff needed more than average supervision and that much improvement was needed.

53. On April 22, 1978, defendant Parsons wrote a memorandum to the Office of Personnel requesting that plaintiff's employment be terminated during the probationary period. Defendant Parsons based this request on: (1) his belief that plaintiff wanted "to do things his way; to reshape the District's regulatory program to conform to his perception of the way things should be"; and (2) his objection to plaintiff's statement to Kenneth Carr of the FWS that he (plaintiff) disagreed with defendant Parsons' decision to issue the conditioned permit to the MAC.

54. On April 28, 1978, plaintiff received a letter signed by defendant Parsons stating that his employment as an applica-

tions review specialist would be terminated as of the close of business on May 12, 1978.

55. The letter set forth the reasons for the discharge as follows:

This action is being taken as a result of your duty performance. It is my judgment that you have failed to demonstrate the necessary qualifications for successful performance in this position. Specifically, you have shown an inability to accept guidance and direction from supervisory personnel, you have failed to properly follow administrative guidelines and operating procedures, and you have demonstrated poor judgment in coordinating your activities with other State and Federal agencies.

56. The Gray's Bay Dam application, the Barker's Island application, and the MAC application all were transferred from plaintiff to other applications review specialists at the direction of defendant Parsons shortly after the conversations in which plaintiff expressed his opinions concerning the manner of processing.

57. Plaintiff's expression of his views concerning the proper method of processing these three applications hindered his ability to carry out his functions as an applications review specialist and the overall operations of the Corps of Engineers.

58. Plaintiff's speech did not play a substantial role in the defendants' decision to discharge him.

59. Plaintiff would have been discharged even if he had not expressed his opinions concerning the methods of processing the Wilkins-Ottertail County Ditch Project, the Barker's Island Project, the MAC Project, and the Minnehaha Creek Project..

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and jurisdiction over the subject matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1361.

2. Plaintiff's expressions of his views hindered the efficient operation of the Corps of Engineers.

3. Plaintiff's speech is not constitutionally protected by the First Amendment.

4. Plaintiff's speech, even if it were constitutionally protected, did not play a substantial role in the defendants' decision to fire him.

5. The defendants would have discharged plaintiff from his position as an applications review specialist even if he had not expressed his views.

6. Plaintiff's First Amendment rights to free speech were not violated by any of the defendants.

7. Plaintiff is not entitled to damages for lost salary and fringe benefits nor to reinstatement as an applications review specialist.

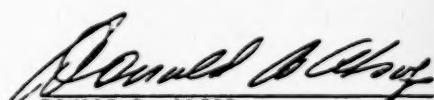
Upon the foregoing findings of fact and conclusions of law,

IT IS ORDERED That the plaintiff, Stanley H. Nathanson, have and recover nothing from the defendants, and that his complaint be dismissed with prejudice.

IT IS FURTHER ORDERED That the Clerk of Court enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That plaintiff's complaint is dismissed with prejudice.

DATED: February 11, 1982.


DONALD D. ALSOP
United States District Judge